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September 27, 1999

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BY HAND DELIVERY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, D.C. 20554

Re: Promotion of Competitive Networks In Local Teleocmmunications Markets, et al., WT Docket No. 99-217; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98

Dear Ms. Salas:

Pursuant to the FCC's Public Notice FCC 99-141, released July 7, 1999, and as amended by DA 99-1563, released August 6, 1999, enclosed for filing in the above-referenced dockets are the original and four copies of the "Reply Comments of Qwest Communications Corporation"

Please contact the undersigned if you have any questions.

Respectfully submitted,

Linda L. Oliver
Counsel for Qwest Communications Corp.

Enclosures

cc: Attached Service List

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List ABCDE

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services	)	
	)	
Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

COMMENTS OF QWEST COMMUNICATIONS CORPORATION

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September 27, 1999

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REPLY COMMENTS OF QWEST COMMUNICATIONS CORPORATION

Qwest Communications Corporation ("Qwest") hereby submits its reply comments on the Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217 and the Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98 (the "Notice"). 1/

1/ Promotion of Competitive Networks in Local Telecommunications Markets, Notice of Proposed Rulemaking and Notice of Inquiry and Third Further Notice of

INTRODUCTION

Qwest is a multimedia communications company offering a full range of voice, data, video and information services both domestically and internationally. Qwest has completed the construction of an 18,500-mile, 150-city fiber optic network that offers customers and carriers the ability to transmit massive amounts of communications information throughout the United States. Qwest's system includes the first nationwide 2.4 gigabit Internet Protocol ("IP") network, which serves as the backbone for Qwest's IP-based services. 2/ This network enables Qwest to move more information faster, more securely, and more reliably than any other network on earth. Qwest also has announced a 25-city deployment of local telephone facilities and a planned roll-out of commercial DSL-based services in over 40 cities by the end of this year.

For end users to realize the full benefits of Qwest's network, Qwest and similarly situated carriers will need to have the ability to obtain access to multiple tenant environments ("MTEs"), including office buildings, office parks, apartment buildings, and other manufactured housing communities. The Commission is correct in stating that access by competitive carriers to these MTEs is "critical to

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Proposed Rulemaking, WT Docket No. 99-217 and CC Docket No. 96-98, FCC 99-141 (rel. July 7, 1999) (the "Notice").

2/ Qwest's network extends 1,400 miles into Mexico, and includes undersea cables in the Atlantic Ocean. In addition, Qwest is part of a joint venture that will extend its reach into Europe and is part of a consortium that is building undersea fiber links to Japan and the Asia Pacific Region.

the successful development of competition in local telecommunications markets." 3/ This is so because, as the Commission states, a substantial portion of American consumers — residential and business — live or operate in MTEs. 4/

SUMMARY

In the Notice, the Commission proposed essentially three different methods of enabling competitive carriers to obtain access to MTEs: (1) access under Section 224(f) of the Communications Act of 1934, as amended (the "Act"), to MTE conduit and rights-of-way that are owned or controlled by utilities, (2) access under Section 251(c)(3) of the Act to riser cable and wiring that ILECs own or control within MTEs; and (3) access under a nondiscrimination requirement imposed on MTE building owners to MTE conduit and rights-of-way. The Commission also asked for comment on whether to prohibit exclusive contracts for serving MTEs.

To promote the development of competition in the local exchange market, the Commission must ensure that competitive local exchange carriers ("CLECs") have the ability to obtain all three means of access to customers in MTEs. The Commission recently adopted an order requiring ILECs to provide sub-elements of the local loop. 5/ Qwest therefore does not in these reply comments deal

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3/ Notice at ¶ 29.

4/ Id.

5/ Press Release, FCC Promotes Local Telecommunications Competition (rel. Sept. 15, 1999).

with the Notice or the initial comments to the extent they address issues that arise under Section 251(c)(3) of the 1996 Act.

The adoption of a sub-loop unbundling requirement, of course, does not address the other issues set forth in the Notice. It does not, for example, enable a CLEC to place its own facilities in an MTE (*e.g.*, where existing facilities are inadequate to support broadband services). As the initial comments filed in this docket make clear, a CLEC trying to place its own facilities in a building could face one of a dozen or more different factual situations depending on the physical arrangement of facilities already in place, the contractual relations between the incumbent and building owner, the location of the demarcation point, and state property law.

In all these cases, however, the bottom line is that a CLEC needs the ability to extend its facilities from Point A (its existing network) to Point B (the customers' premises). Notwithstanding the myriad factual situations that may arise, most fall within one of two basic scenarios – either (1) the ILEC owns or controls essential conduit and rights-of-way that could be used by the CLEC to get from Point A to Point B or (2) the building owner has retained control over access to customers, thereby preventing the CLEC from extending its network from Point A to Point B.

To solve the building access problem, Qwest urges the Commission to take two important steps. First, the Commission should interpret Section 224(f) as

requiring "utilities" to make available conduit and rights-of-way inside, or on top of, MTEs. Second, in situations where the building owner, rather than a carrier, owns and controls in-building wiring and conduits, the Commission should impose an obligation that the building owner provide nondiscriminatory access to all carriers. At a minimum, the Commission should prohibit building owners and carriers from entering into exclusive arrangements for serving MTEs.

I. SECTION 224 REQUIRES UTILITIES TO PROVIDE ACCESS TO ALL CONDUIT AND RIGHTS-OF-WAY THAT CAN BE USED TO REACH AN END USER.

A critical question raised in the Notice is how broadly the Commission should interpret the obligation under Section 224(f) that utilities provide nondiscriminatory access to poles, ducts, conduit and rights-of-way that they own or control. 6/ In particular, the Commission has asked whether the obligations imposed on utilities under Section 224(f) should cover conduit and rights-of-way within MTEs.

A number of ILECs argue that the Commission should not expand Section 224(f) to cover in-building rights-of-way and conduit. 7/ They argue that the allocation of rights between the ILEC and building owner depends both on the physical arrangement of facilities, the existing contractual relationship between the

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6/ Notice at ¶ 39.

7/ See Bell Atlantic Comments at 7; SBC Comments at 3-5.

ILEC and the building owner, and the law in the particular state, and therefore is not an appropriate area for Commission intervention. 8/

Qwest agrees that the Commission's task here is made more difficult by the numerous factual situations that CLECs encounter when trying to reach customers in an MTE. But the fact that this is a complicated issue is not a reason for the Commission to shy away from attempting to eliminate this obstacle to competition.

In deciding how broadly to interpret Section 224(f), Qwest believes the Commission must not lose sight of the ultimate goal – to provide end users in an MTE with access to their choice of carriers. To achieve that goal, an entity subject to Section 224(f) should be required to provide nondiscriminatory access to any conduit or right-of-way that it owns or controls, including conduit or right-of-way inside or on top of a building, that would enable a requesting carrier to serve a customer in the MTE.

A. Utilities Should Be Required To Provide Access To In-Building Conduit.

As numerous commenters point out, the Commission is correct in concluding that Section 224 requires utilities to provide telecommunications carriers with access to in-building conduit, such as riser conduit, that is owned or

8/ See Bell Atlantic Comments at 7-8; BellSouth Comments at 15.

controlled by a utility. 9/ The language of Section 224 itself requires utilities to provide access to "conduit" with no limitations on that term. Because this term is not ambiguous, legislative history, such as the Senate report language regarding "underground reinforced passages," 10/ cannot be used to impose limitations on the meaning of that term. 11/ As noted by AT&T, a limited reading of the term "conduit" also would be inconsistent with industry practice, which uses the term "conduit" in a broad sense to include both underground and aboveground structures. 12/

Qwest also supports the comments of AT&T and others recommending that the Commission make clear that a utility "controls" conduits when it has either obtained the right to use conduit, or when it has taken other action to secure such rights, such as by exercising the power of eminent domain. 13/ This construction of "control" should apply regardless of whether the utility has actually used the conduit it has so obtained. This reading of Section 224 is consistent with its plain

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9/ Notice at ¶ 44. See AT&T Comments at 18; Nextlink Comments at 7-8.

10/ Notice at ¶ 44, citing AEPSC et. al. Opposition at 7, citing S.Rep. No. 580, 95th Cong., 1st Sess. at 26.

11/ Republic of Argentina v. Weltover, Inc., 112 S.Ct. 2160 (1992); American Hospital Association v. NLRB, 499 U.S. 606 (1991) (Legislative history cannot trump a textual plain meaning.); Wisconsin Public Intervenor v. Morier, 111 S.Ct. 2476, 2485 n.4 (1991) (Legislative history should be consulted when a statute is ambiguous.).

12/ See AT&T Comments at 18-19.

13/ See Winstar Comments at 55-56; AT&T Comments at 20-21.

language – which simply refers to "control" – as well as with its purpose – to promote competition.

B. Utilities Should Be Required To Provide Access To Rooftops and Other Rights-of-Way.

Qwest concurs with the comments of the numerous CLECs that support the Commission's tentative conclusion that Section 224(f) should be read to impose a broad obligation on utilities to provide access to rights-of-way in or on MTE property. 14/

Section 224(f) clearly includes rights-of-way on private property. As the Commission recognized in the Notice, there is no language in Section 224 that would limit its application to "public" rights-of-way. The inclusion of language specifying "public" rights-of-way in Section 253, 15/ contrasted with the absence of such limiting language in Section 224, indicates that Congress consciously rejected such a limitation in Section 224. The Commission also is correct that the inclusion of the term "controls" in addition to "owns" in connection with rights-of-way in Section 224 indicates that Congress intended Section 224 to encompass rights-of-way over the private property of third parties.

The Commission should adopt its tentative conclusion that the term "rights-of-way" in Section 224 includes a right to place an antenna on public or

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14/ Notice at ¶ 41. See Teligent Comments at 24-40; Winstar Comments at 51-64.

15/ 47 U.S.C. § 253(c).

private premises. 16/ Contrary to the suggestion of some ILECs, and as noted by Winstar and Teligent, granting CLECs a right to piggyback on the rooftop rights of incumbent carriers generally would not exceed the broad rights possessed under a utility easement. 17/

In addition, the Commission should adopt its tentative conclusion that the term "rights-of-way" encompasses property owned and used by a utility as part of its distribution network. 18/ Extending the obligation of utilities under Section 224 to include property owned by a utility is entirely consistent with the purpose of Section 224 – allowing telecommunications carriers to piggyback on infrastructure and rights-of-way used by utilities in providing service to customers.

II. BUILDING OWNERS SHOULD BE REQUIRED TO PROVIDE NONDISCRIMINATORY ACCESS TO BUILDINGS.

A. Requiring Building Owners To Provide Nondiscriminatory Access Promotes Competition.

In some cases, a utility subject to Section 224(f) does not own or control conduit or rights-of-way inside a building. In other cases, the rights possessed by the utility are sufficiently restricted that they cannot be transferred to a CLEC. In these cases, the building owner effectively exercises total control over the

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16/ Notice at ¶ 42.

17/ See, e.g., Winstar Comments at 57, citing C/R TV, Inc. v. Shannondale, Inc., 27 F.3d 104, 108 (4th Cir. 994) and Centel Cable Television Co. of Ohio v. Cook, 507 N.E. 2d 1010, 1014 (Ohio 1991). See also Teligent Comments at 29-31; .

18/ Notice at ¶ 43.

telecommunications choices available to its tenants. While many building owners have recognized the value of providing their tenants with a choice of telecommunications providers, in many other cases building owners exert their control by preventing entry by competing carriers.

Building owners point to a parade of horribles that would result if they were subject to any type of nondiscriminatory access requirement, including possible damage to property, safety and security concerns, increased insurance costs and diminished service quality. 19/ The concerns identified by the building owners should sound familiar to the Commission because they are remarkably similar to concerns previously raised by ILECs and by local governments in the past. As it has before, the Commission should reject these arguments as nothing more than speculation. 20/ As competition has been introduced in the local market, experience confirms that ILECs have been able to protect their property while providing CLECs with access to central offices. Similarly, local governments have been able to protect their property while providing multiple carriers with access to public rights-of-way. Building owners have presented no evidence that would

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19/ See, e.g., Community Associations Institute Comments at 20-24.

20/ See, e.g., Classic Telephone, Inc., 11 FCC Rcd 13082 (1996) (local government may manage public rights-of-way, but may not preclude entry by additional telecom providers); Deployment of Wireline Services Offering Advanced Telecommunications Capability, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 98-147, FCC 99-48 (rel. Mar. 31, 1999) (requiring ILECs to provide cageless collocation and other shared collocation arrangements).

suggest their experience would be different. Simply put, a nondiscrimination requirement would prohibit requirements that unreasonably deny consumer choice, but it would not strip the ability of a building owner to place reasonable conditions on access to, and use of, its property.

Some parties suggest that prohibiting exclusive access agreements between building owners and telecommunications carriers is all that is needed to solve the building access problem. 21/ Although Qwest supports a prohibition on exclusive access agreements, the Commission should not overestimate the value of such a prohibition. An arrangement that is not technically "exclusive" may in fact have the practical effect of being exclusive, if the building owner refuses to make the same arrangement available to other carriers. In other words, in the absence of a nondiscrimination requirement, a prohibition on exclusive access arrangements still leaves CLECs subject to discriminatory and unreasonable conditions on access.

B. The Commission Has The Legal Authority To Impose A Nondiscriminatory Access Requirement On Building Owners.

While the Commission appears to recognize the value a nondiscrimination requirement may have in promoting competition, the Notice asks whether the Commission has legal authority to impose such a requirement. 22/ As explained in the comments of many CLECs, the Act provides the Commission with

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21/ See Bell Atlantic Comments at 5-6.

22/ Notice at ¶¶ 56-58.

all the necessary legal authority to impose a nondiscrimination requirement on building owners. 23/

The 1996 Act established an unambiguous federal policy favoring competition over monopoly with respect to telecommunications services. When a building owner exercises control over access to its property in a manner that limits the choices available to its tenants, it is acting in a manner that clearly contravenes the policy established by Congress. In these circumstances, the Commission's ancillary authority under Title I of the Act is more than adequate to justify imposing a nondiscriminatory access requirement on building owners.

The only question, therefore, is whether a nondiscrimination requirement is an unconstitutional taking of the building owner's property that would violate the Fifth Amendment. As the CLEC comments demonstrate, the answer to this question is no. Qwest agrees with Nextlink and others that a nondiscriminatory access requirement does not constitute a taking when the requirement is tailored to apply only if the property owner has already permitted another carrier to physically occupy its property. 24/ Under these circumstances, there is no new physical occupation of the property that would trigger a takings claim.

23/ See Nextlink Comments at 10-12; Winstar Comments at 30-32; Teligent Comments at 48-52.

24/ See Nextlink Comments at 12-14.

III. CONCLUSION

CLECs face continuing difficulties in placing their own facilities in MTEs. The recommendations in these reply comments are designed to ameliorate this problem. First, to the extent any utility subject to Section 224(f) owns or controls conduit or rights-of-way in an MTE, it must be required to provide nondiscriminatory access to requesting carriers. Second, where a building owner, rather than a utility, owns and controls the conduit and rights-of-way inside the MTE, the building owner should be subject to an obligation to provide non-discriminatory access to requesting carriers. At a minimum, the Commission should prohibit telecommunications carriers from entering into exclusive arrangements for access to MTEs.

Respectfully submitted,

QWEST COMMUNICATIONS CORPORATION

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September 27, 1999

CERTIFICATE OF SERVICE

I, Linda L. Oliver, hereby certify that on this 27th day of September, 1999, copies of the foregoing "Reply Comments of Qwest Communications Corporation", filed in WT Docket #99-217 and CC Docket #96-98, were served by hand delivery to the following:

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